Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

October Term, 1996

DEBRA M. SMOLKO,

Petitioner,

v.

GTE SERVICE CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

LELAND M. MALCHOW
Counsel of Record
Attorney for Petitioner
P.O. Box 460
Augusta, GA 30903
(706) 724-8890

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

22 pp

QUESTIONS PRESENTED

1. Whether the district court's June 28, 1996 order granting Defendant's motion to dismiss was in error, because the Defendant was properly served on January 17, 1996.

2. In the alternative, Plaintiff should have been allowed an extension of time so as to allow service that was effectuated on Appellee-Defendant on April 23, 1996, or allow Appellant-Plaintiff to serve Appellee-Defendant again under Federal Rule of Civil Procedure 4(m).

LIST OF PARTIES

The following individuals or entities may have an interest in the outcome of this Appeal:

Scott G. Blews, King & Spalding – Attorney of Appellees
Sharon Blair Enoch, formerly of Nimmons & Malchow – Attorney for Appellant
GTE Service Corporation – Appellee
Michael W. Johnston, King & Spalding – Attorney for Appellee
Leland M. Malchow, Nimmons & Malchow – Attorney for Appellant
Ken M. Nimmons, Nimmons & Malchow – Attorney for Appellant
Debra M. Smolko – Appellant

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OPINIONS BELOW

This is an appeal from an Eleventh Circuit decision. Smolko v. GTE Corp., No. 96-8897) (11th Cir. January 23, 1997) (App. 8-9), which Petition for Rehearing and Suggestion of Rehearing En Banc was denied on March 21, 1997 (App. 10-11). The District Court opinion is Smolko v. GTE Service Corp., No. CV 193-88 (S.D. Ga. Order June 28, 1996) (App. 1-7).

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its opinion on January 23, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fed. R. Civ. P. 4(m):

(m) TIME LIMIT FOR SERVICE. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

STATEMENT OF THE CASE

In an Order dated April 11, 1995, the District Court originally dismissed this case for failure to prosecute. (R3) In an Order dated May 3, 1995, the Georgia Supreme Court suspended the Plaintiff's original counsel from the practice of law until further notice. Said suspension was mailed to the Court in a letter dated July 25, 1995, and received by the United States District Court on July 31, 1995. (R4)

In an Order dated August 15, 1995, the Honorable Dudley H. Bowen, Jr. issued a Show Cause Order as to why said case should not be re-opened. (R5)

In response to said Order, Plaintiff mailed the Court a letter dated August 21, 1995, which was received on August 25, 1995. (R6) The Plaintiff outlined her attempts to retain another lawyer, as well as inform the Court of a serious automobile collision which occurred on June 25, 1995, in which she sustained major head, lung, neck and knee injuries. The Court re-opened Plaintiff's case subject to notification as to whether she is to proceed pro se or with an attorney. (R7) On October 25, 1995, Sharon Blair Enoch, formerly of Nimmons & Malchow, made a Notice of Appearance and filed a First Amended Complaint. (R8, R9)

On October 26, 1995, Plaintiff's counsel mailed the Amended Complaint along with a Notice of Lawsuit and Request for Waiver of Service, one original and one copy of the Waiver of Service of Summons, Plaintiff's Rule 26.3 Interrogatories, and Plaintiff's Interrogatories and Request for Production of Documents to GTE and Notice

of Case Management Procedures to the Defendant. The return of service was dated October 30, 1995.

Plaintiff contends that she personally served GTE through CT Corporate Systems with the Amended Complaint which contained a valid Summons which was attached as Exhibit "D" on January 17, 1996. The Defendant did not answer said Complaint within twenty (20) days of that service.

The Defendant filed a Motion to Reconsider, or in the Alternative, Motion to Dismiss. The Motion to Dismiss was granted by the District Court on June 28, 1996 (App. 1-7). The Eleventh Circuit affirmed the District Court on January 23, 1997 (App. 8-9).

REASONS FOR GRANTING THE WRIT

1.

The District Court Erred in Finding That the Defendant Was Not Properly Served With the Amended Complaint and Summons on January 17, 1996

In the present case, the original Summons, original Complaint, and Amended Complaint were served on the Defendant on January 17, 1996, and no answer has been filed by the Defendant within twenty (20) days of service as required under Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure. Rule 4(c)(1) states a Summons shall be served together with a copy of the Complaint. There is no requirement that a "separate" Summons be served as argued by Defendant, even though a separate Summons was served in this case. Furthermore, Plaintiff argues that the original Summons that was served as Exhibit "D" to

the Amended Complaint had not expired. Thus, the Defendant is in default since it did not answer within twenty (20) days of service of the Complaint, Amended Complaint and Summons that was served on January 17, 1996.

2.

The District Court Erred in Granting Defendant's Motion to Dismiss, and the United States Supreme Court Has a Chance to Interpret the New Federal Rule of Civil Procedure 4(m) for the First Time in This Case.

The Court erred in dismissing the case and not allowing Plaintiff-Appellant additional time to effect service. Rule 4(m) is an amendment of the old Rule 4(j). As the Advisory Committee notes indicate, the new rule "retains much of the language of the present subdivision (j)." See Federal Rules of Civil Procedure 4 Advisory Committee Notes to 1993 Amendments. There is, however, a substantial change as to what may happen if a plaintiff fails to meet the 120-day deadline. As in the past, the Court "shall dismiss the action without prejudice as to the defendant" unless the plaintiff "shows good cause for failure," the wording being close to, but not exactly the same as old Rule 4(j). The dismissal can also be made both "upon motion or on the Court's own initiative after notice to the plaintiff" as in the past. The change comes as to the allowance of additional time. The new subdivision explicitly provides that the court shall allow additional time if there is good cause for the plaintiff's failure to effect service in the prescribed 120 days. It also "authorizes the court to relieve a plaintiff of the consequences of

application of this subdivision even if there is no good cause shown." *Id.*

The Advisory Committee notes go on at some length to comment on why a plaintiff might be relieved of the 120-day time limit in the absence of "good cause shown." According to the Committee, such relief formerly was afforded in some cases, partly in reliance on Rule 6(b). Relief may be justified, for example if the applicable statute of limitations would be the re-filed action, or if the defendant is evading service or conceals a defect in attempted service. *Ditkof v. Owens-Illinois, Inc.*, 114 FRD 104 (E.D. Mich. 1987).

In *Espinoza v. United States*, 52 F.3d 838 (10th Cir. 1995), the court held that even if the plaintiff fails to show good cause for its untimely service of summons so as to be entitled to a mandatory extension of time, the new Rule 4(m) requires the District Court to consider whether permissive extension of time may be warranted. Under Rule 4(m), the court may extend time even if good cause is not shown. *Petrucelli v. Bohringer and Ratzinger*, 46 F.3d 1298 (3rd Cir. 1995).

In the present case, the statute of limitations would bar a re-filed action, and the Defendant has concealed the alleged defect in the attempted service on January 17, 1996. Those issues constitute "good cause" under the advisory notes to Rule 4(m). Thus, if the Court finds the Defendant was not properly served on January 17, 1996, the Plaintiff should be allowed an extension of time so as to allow the service that was effectuated on April 23, 1996 or allow Plaintiff to serve Defendant again.

CONCLUSION

For the reasons set forth above, the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

LELAND M. MALCHOW
Counsel of Record
Attorney for Petitioner

LELAND M. MALCHOW
P.O. Box 460
Augusta, GA 30903
706-724-8890

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
AUGUSTA DIVISION

DEBRA M. SMOLKO,	*	
Plaintiff,	*	CIVIL ACTION NO.
	*	CV 193-88
v.	*	
	*	
GTE SERVICE CORP.	*	
Defendant.	*	

ORDER

(Filed June 28, 1996)

Before the Court in the above-captioned case is Defendant's Motion to Reconsider, or in the Alternative, Motion to Dismiss. The Motion to Dismiss the case in its entirety is **GRANTED** for reasons stated below.

Procedural Background

Plaintiff Debra Smolko filed this gender discrimination suit against Defendant GTE Service Corp. on May 27, 1993. A summons was issued by the clerk of court that same day. Pursuant to Federal Rule of Civil Procedure 4(j), the summons and complaint had to be served on

Defendant within 120 days of filing the complaint. Otherwise, in the absence of good cause, the action had to be dismissed without prejudice. Fed. R. Civ. P. 4(j).[1]

Plaintiff mailed the complaint and summons, together with a request for acknowledgement of mail service, to Defendant on September 24, 1993, the 120th day after filing the complaint. Defendant, of course, did not receive the request for acknowledgement of mail service until after the time for perfecting service had expired. Thus, Defendant did not acknowledge service by mail. Plaintiff took no further action. The case was dismissed on April 11, 1995, for failure to prosecute.

On July 31, 1995, Plaintiff sent a letter to the Court requesting that the case "be reopened due to legal misrepresentation." Plaintiff explained that her attorney, Lourdes Neely Coleman, had been suspended from practice on May 3, 1995, for failure to adequately respond to the Georgia State Bar's Notice of Investigation, which was apparently issued in response to a grievance filed by Plaintiff. Plaintiff was ordered to show cause why the

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[1] Rule 4(j) read in pertinent part:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

Rule 4(j) was amended on December 1, 1993, and renumbered as Rule 4(m).

case should be reopened, "particularly in light of Plaintiff's 80-day delay in making her request."

On August 25, 1995, Plaintiff responded to the show cause order by letter, stating that she had been trying to obtain alternative legal counsel since Ms. Coleman's suspension, but her efforts were hampered because she did not live in Georgia and she had been in a serious car accident in June.

Given the serious nature of Plaintiff's problem with her legal counsel's representation in this case, I reopened the case on October 6, 1995.[2] Plaintiff filed an amended complaint on October 26, 1995, but a new summons was not issued. In December of 1995, Plaintiff mailed the amended complaint, with a request for waiver of service, to defendant. Defendant did not sign the waiver of service, as is its prerogative.

On January 17, 1996, Plaintiff personally served Defendant with a copy of the amended complaint, but did not serve a valid summons. Instead, Plaintiff attached a copy of the original summons issued on May 27, 1993 as an exhibit to the amended complaint. Plaintiff also served Defendant with another request for waiver of service of summons, which Defendant did not sign. Finally, on

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[2] Defendant has filed a Motion for Reconsideration, arguing that the Court improperly granted Plaintiff's Motion to Reopen the case under Fed. R. Civ. P. 60(b). Because I am granting Defendant's Motion to Dismiss, I need not reexamine the propriety of reopening the case on October 6, 1995. Accordingly, Defendant's Motion for Reconsideration is **DENIED AS MOOT.**

April 23, 1996, Plaintiff personally served a new summons (issued April 17, 1996) and the amended complaint of Defendant.

Before the Court is Defendant's Motion to Dismiss the Complaint for failure to perfect service of process.

Defendant's Motion to Dismiss

Defendant first contends this case should be dismissed for failure to serve the original complaint of May 27, 1993 in an effective and timely manner. Service should have been made 120 days after May 27, 1993. Fed. R. Civ. P. 4(j).

Indeed, service of the original complaint had not been perfected within 120 days of filing the complaint. The time for service expired on September 24, 1993. Plaintiff never attempted to personally serve Defendant within this 120-day period, and unacknowledged service by mail did not constitute perfected service. The case therefore was properly dismissed at the time.

Defendant points out that Plaintiff has never requested an extension of time for service and that the filing of an amended complaint does not automatically extend the time for service. Hence, Defendant asks this Court to dismiss the case once again for failure to perfect service of the original complaint by September 24, 1993. However, I essentially gave Plaintiff a second bite at the apple when the case was reopened. It would be paradoxical to dismiss this case once again for ineffective service of the original complaint when I have effectively excused

Plaintiff's lack of diligence in 1993 by reopening the case in 1995.

In any event, Defendant next argues correctly that the case should be dismissed because Plaintiff failed to effect valid service of the amended complaint. In December of 1995, Defendant received a request for waiver of service of the amended complaint, but declined to waive service. Plaintiff then attempted to personally serve Defendant in January of 1996, but she did not attach a valid summons. Plaintiff again requested Defendant to waive service of the summons at this time, but Defendant refused. The original summons issued on May 27, 1993 was attached to the amended complaint as an exhibit, but this summons had expired. *See generally* Wright & Miller, *Federal Practice and Procedure*, § 1085, at 23 (1987) ("The life of a summons, then, is 120 days."). Rule 4(c) clearly requires the service of the complaint and a valid summons. Therefore, the attempted service in January was improper.

Plaintiff finally perfected service on April 23, 1996, nearly six months after filing her amended complaint. Thus, service of process was not timely.

Fed. R. Civ. P. 4(m) governs the consequences of untimely service of the amended complaint. Rule 4(m) provides the following:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to Plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if

> the Plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.

Pursuant to this rule, the Court must allow additional time if the Plaintiff can demonstrate good cause. However, the rule also "authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown." Fed. R. Civ. P. 4(m), Adv. Comm. Notes.

Plaintiff has not set forth any reason to excuse the failure to timely serve the amended complaint. Certainly, Plaintiff cannot blame her inability to properly serve Defendant with the amended complaint until April of 1996 on her difficulties with her original attorney. Indeed, Plaintiff has been represented by counsel since the summer of 1995. Thus, Plaintiff cannot demonstrate good cause.

Plaintiff's responsive brief now seeks a belated extension of time to perfect service. There is no reason why such an extension should be granted when Plaintiff has been given every benefit of the doubt to this point and two opportunities to prosecute this action. The Federal Rules of Civil Procedure have been promulgated to govern and advance the respective positions of both parties to a civil action; Defendant is certainly entitled to expect any protection the rules offer it through a consistent and fair application of the rules. Accordingly, I find Plaintiff has failed to properly effect service of process of the amended complaint, and, in the absence of good cause, the case should be dismissed.

Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED**. As stated previously, Defendant's Motion for Reconsideration is **DENIED AS MOOT.** Plaintiff's Motion for Oral Argument is also **DENIED AS MOOT.**

Because Plaintiff's Motion for Default Judgment rests on the erroneous premise that service of the amended complaint was properly effected in January of 1996, this motion is **DENIED.** Furthermore, Plaintiff's lack of diligence in prosecuting this case effectively precludes any recovery of costs incurred by Plaintiff in attempting to personally serve Defendant. Accordingly, Plaintiff's Motion for Imposition of Costs for Failure to Waive Service of Summons is **DENIED**

The clerk is instructed to close this case and enter final judgment for Defendant. Costs are taxed against Plaintiff.

ORDER ENTERED at Augusta, Georgia, this 28th day of June, 1996.

/s/ illegible
UNITED STATES
DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-8897
Non-Argument Calendar

D. C. Docket No. CV193-88

DEBRA M. SMOLKO,

Plaintiff-Appellant,

versus

GTE SERVICE CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Georgia

(Filed January 23, 1997)

Before TJOFLAT, Circuit Judge, FAY and KRAVITCH*, Senior Circuit Judges.

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* Judge Kravitch was in regular active service when this matter was originally submitted, but has taken senior status effective January 1, 1997.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

"Costs taxed against plaintiff-appellant."

Judgment Entered: January 23, 1997
For the Court: Miguel J. Cortez, Clerk

By: /s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 4/2/97

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;
(b) the evidence in support of a jury verdict is sufficient;
(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 96-8897

DEBRA M. SMOLKO,

Plaintiff-Appellant,

versus

GTE SERVICE CORP,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Georgia

(Filed Mar. 21, 1997)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion, 11th Cir., 19__, ___ F.2d ___.

Before: TJOFLAT, Circuit Judge, FAY and KRAVITCH*, Senior Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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*Judge Kravitch was in regular active service when this matter was originally submitted, but has taken senior status effective January 1, 1997.

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JUN 13 1997
OFFICE OF THE CLERK

No. 96-1801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DEBRA M. SMOLKO,
Petitioner,

v.

GTE SERVICE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL W. JOHNSTON
Counsel of Record
SCOTT G. BLEWS
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

I. Whether compelling reasons exist for this Court to issue a writ of certiorari for the purpose of interpreting Fed. R. Civ. P. 4(m), even though the issues presented are neither of great importance to the public, novel, nor difficult, do not raise a conflict among the circuits, and were correctly decided below.

PARTIES TO PROCEEDINGS BELOW

Respondent certifies the parties listed in the caption are the only parties who appeared in the proceedings below. In accordance with Sup. Ct. R. 29.6, Respondent further certifies it has no subsidiaries and its parent corporation is GTE Corporation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1801

DEBRA M. SMOLKO,
Petitioner,

v.

GTE SERVICE CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit are unreported and are set forth in the Appendix to the Petition for Writ of Certiorari at pages App. 8 to App. 11. The opinion of the United States District Court for the Southern District of Georgia is unreported and is set forth in the Appendix to the Petition at pages App. 1 to App. 7.

STATEMENT OF JURISDICTION

This Court has jurisdiction over the Petition for Writ of Certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 4(m) provides:

> **Time Limit for Service.** If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).

STATEMENT OF THE CASE

On May 27, 1993, Petitioner Debra M. Smolko filed a complaint seeking relief against GTE Service Corporation ("GTE") under Title VII, 42 U.S.C. § 2000e, *et seq.*[1] (Record 1 at 1.) The clerk of the district court issued a summons on the same date. (Record 9-Exh. D.) On September 24, 1993, the 120th day after filing her complaint, Smolko mailed a notice and acknowledgment of service by mail to GTE. (Record 23 at 2.) GTE did not acknowledge service by mail, having received the request after the 120 days allowed for service under Fed. R. Civ. P. 4 had expired. (Record 23 at 2; Record 14 at 2.) When Smolko made no effort to request an extension of time to serve or otherwise prosecute her action for nearly two years, the district court dismissed the case for lack of prosecution, and the clerk entered judgment accordingly. (Record 2; Record 3.)

Over three months later, Smolko sent the district court a letter, *ex parte*, requesting the court reopen the action

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[1] Smolko's complaint did not cite Title VII, but sought relief under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, the amendments to the remedial provisions of Title VII. (Record 1.)

and claiming "legal misrepresentation" as the basis for reopening. (Record 4.) Apparently treating Smolko's correspondence as a motion for relief from judgment under Fed. R. Civ. P. 60(b), the district court entered an order directing Smolko to show cause why the case should be reopened. (Record 5.) Smolko responded by a second letter, again *ex parte*. (Record 6.) The district court entered an order reopening the action on October 5, 1995. (Record 7.)

Smolko, now represented by new counsel, filed an amended complaint on October 26, 1995, but did not seek the issuance of a new summons or request an extension of time to effect service. (Record 9.) Smolko then mailed to GTE a request for waiver of service with the amended complaint. (Record 23 at 3; Record 17-Exh. A.) GTE declined to waive service of the amended complaint because to do so might waive GTE's defense that the case should be dismissed on the basis of Smolko's failure to effect timely service of her original complaint. (Record 14 at 2.)

On January 17, 1996, Smolko personally served GTE's registered agent with a copy of the amended complaint, but did not include a separate copy of a valid summons. (Record 12.) Rather, the only summons contained in the package served on GTE's agent was a copy of the original summons issued over two and a half years earlier. This summons was attached to the amended complaint as an exhibit supporting the allegations in the amended complaint. (Record 12; Record 9-Exh. D.) Further, the package included a request for waiver of service of summons. (Record 12.) Thus, it appeared Smolko was again requesting GTE waive service of a separate, valid summons.

When GTE did not waive service, Smolko obtained a new summons (issued on April 17, 1996) and on April 23, 1996, personally served the new summons and the

amended complaint on GTE's agent. (Record 13.) This service was nearly three years after the original complaint was filed and 180 days after the amended complaint was filed.

After finally receiving valid (but untimely) personal service, GTE filed a motion for reconsideration of the district court's order reopening the case and to dismiss for failure to timely effect proper service. (Record 14.) The district court held that (1) by reopening the case on October 5, 1995, it implicitly granted Smolko an extension of time to serve her amended complaint,[2] (2) Smolko's attempt to serve GTE on January 17, 1996 was invalid, and (3) the time for Smolko to serve her amended complaint should not be extended to April 23, 1996, when Smolko finally effected proper (but untimely) service. (Record 23 at 4-6.) Accordingly, the district court granted GTE's motion to dismiss. (Record 23 at 7.) The clerk entered judgment in favor of GTE and against Smolko. (Record 24; Record 25.)

Smolko appealed to the United States Court of Appeals for the Eleventh Circuit, which issued an unpublished, per curiam opinion affirming the district court's dismissal of Smolko's case. (Appendix to the petition at App. 8-9.) The Eleventh Circuit likewise denied Smolko's petition for rehearing and suggestion of rehearing en banc. (Appendix to the petition at App. 10-11.)

REASONS FOR DENYING THE WRIT

A petition for a writ of certiorari should be granted only "for compelling reasons." Sup. Ct. R. 10. The decision below is correct, does not conflict with any decision of this Court or of another court of appeals, and presents no issue of continuing or national importance that merits

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[2] The court rejected as moot GTE's argument that the case should not have been reopened in the first place. (Record 23 at 3, n.2.)

this Court's attention. Accordingly, review by this Court is not warranted.

I. No Issues Of Continuing Or National Importance Exist In This Case.

Smolko's only argument that this case merits review by this Court—that the opportunity to interpret Rule 4(m) for the first time is an important question of federal law—is simply wrong. The meaning of Fed. R. Civ. P. 4(m) is plain on its face and needs no further elaboration or interpretation by this Court. Nor does the issue presented by this case arise out of a split of authority among the circuits. Indeed, in this case, the parties never disputed that under Rule 4(m) a district court (1) must grant an extension of time to effect service if "good cause" exists, and (2) has discretion to grant an extension of time to effect service even in the absence of "good cause." *See*, Fed. R. Civ. P. 4(m) advisory committee's note (1993 Amendments). Likewise, the district court applied this two step analysis, (1) correctly finding Smolko had not demonstrated good cause, and (2) declining to grant a second discretionary extension because the court had already given Smolko an extension of time to effect proper service of this action and she failed to do so. (Order, Appendix to the petition at App. 6.)

It is apparent, therefore, although the issues raised by the petition are important to the parties, they are neither important to the public at large, novel, nor difficult. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (stating "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties"); *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issues must be "beyond the academic or the episodic"). This Court, therefore, should deny the petition.

II. The District Court Correctly Dismissed This Case For Failure To Effect Timely Service.

Smolko tried four times over almost three years to serve this action. Every attempt was either improper, untimely, or both. Accordingly, the district court properly granted GTE's motion to dismiss.

Smolko's first attempt at service came on September 24, 1993 when she mailed a notice and acknowledgment of service by mail to GTE pursuant to the pre-December 1993 Rule 4(c)(2). GTE did not acknowledge service by mail and Smolko never attempted personal service of the complaint. Thus, service was never perfected and the district court properly dismissed the case for failure to prosecute. *See, Schnabel v. Wells,* 922 F.2d 726, 728 (11th Cir. 1991) (unacknowledged service by mail does not constitute service under Fed. R. Civ. P. 4.). About this, there is no dispute.

Smolko's next effort at service occurred after Smolko convinced the district court through *ex parte* filings to re-open the case and allow her to file an amended complaint.[3] Smolko first tried to serve the amended complaint by mailing it to GTE with a request for waiver of service pursuant to Rule (4)(d), as amended in December 1993. GTE

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[3] The district court erred by reopening. The only justification Smolko advanced in her *ex parte* requests to reopen was "legal misrepresentation," which is not a valid reason for relief under Rule 60(b) where neither Smolko nor her attorney took any steps whatsoever for two years to prosecute this action. *See, Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.,* 803 F.2d 1130, 1132 (11th Cir. 1986) ("An attorney's negligen[ce] . . . does not constitute excusable neglect, even if that attorney is preoccupied with other litigation."); *Florida Physician's Ins. Co. v. Ehlers,* 8 F.3d 780, 784 (11th Cir. 1993) (denying request for relief under Rule 60(b) based on attorney neglect because litigant had "duty to act with some diligence to ensure that her attorney was protecting [her] interests"). The district court could and should have dismissed the case on this basis as well.

declined to waive service. Again, there is no dispute that this attempt did not perfect service.

A. Smolko's January 1996 attempt at service was improper.

In January 1996, Smolko again requested GTE to waive service of a valid summons by personally serving the amended complaint and a request for waiver on GTE's registered agent. This attempt at service was improper because the package served did not include a separate, valid summons. Although a copy of the 1993 summons was attached as exhibit D to the amended complaint served on January 17, 1996, this summons expired on September 24, 1993, and thus could not be used to perfect service. *See, Grammenos v. Lemos*, 457 F.2d 1067, 1071 (2d Cir. 1972) ("[T]he court has power, under Fed. R. Civ. P 4(a), if the service is invalid or improper, to cause *additional or new summons* to be issued and good service attempted.") (emphasis added); *Arens v. G. R. Mfg. Co.*, No. 4:90-CV-112, 1991 U.S. Dist. LEXIS 3288 (W.D. Mich. Mar. 13, 1991) (finding that on 120th day after issuance, "pursuant to Fed. R. Civ. P. 4(j) the Summons in this matter expired"); *Comer v. Interstate United Corp.*, 118 F.R.D. 79, 81 (N.D. Ill. 1987) ("The summons issued with the original complaint was invalid because the original summons and complaint were not served upon [defendant] within 120 days[.]"); Wright & Miller, Federal Practice and Procedure, § 1085, p. 23 ("The life of a summons, then, is 120 days.").

Moreover, the January 1996 attempt at service was invalid because even if the summons had not expired, Smolko did not serve GTE with a separate copy of the summons. Rather, she personally served GTE with a request for waiver of service of summons. (Record 12.) The plain language of Rule 4(c) requires service of a complaint *and* a separate summons to put a defendant

on notice that it must respond to the complaint. By hiding the summons as exhibit D to the amended complaint while simultaneously serving GTE with a request for waiver and thereby misleading GTE to believe that she was not attempting personal service, Smolko failed to comply with the plain language of Rule 4(c).

Smolko's own conduct belies her argument that the January 1996 attempt at service was proper. Rather than seeking a default after GTE did not answer within twenty days of January 17, 1996, Smolko obtained a new summons and made another attempt at service on April 23, 1996.[4] (Record 13.)

B. Smolko's April 23, 1996 attempt at service was untimely and the district court correctly declined to grant her a *second* extension of time to perfect service.

Smolko's final attempt at service came on April 23, 1996 when she personally served on GTE's agent a package containing the amended complaint (filed on October 26, 1995) and a new summons issued on April 17, 1996. This attempt at service was untimely because it was more than 120 days after both (1) the case was reopened and (2) Smolko filed her amended complaint.

When GTE moved to dismiss, Smolko asked the district court for a second discretionary extension up to and including April 23, 1996. The district court properly refused the request because Smolko neither demonstrated good cause nor a sufficient basis for the court to grant a discretionary extension.

Smolko contends "good cause" existed because (1) the statute of limitations would bar the refiling of her action and (2) GTE allegedly "concealed" the defect in her

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[4] Smolko sought the entry of default on May 29, 1996, *after* she obtained a new summons and *after* GTE moved to dismiss. (Record 15.)

January 17, 1996 attempt at service. Both arguments are without merit. First, Smolko's inability to refile this action because the statute of limitations expired does not constitute good cause. *Traina v. United States*, 911 F.2d 1155, 1157 (5th Cir. 1990) ("It is well settled that inability to refile a suit does not bar dismissal[.]"); *accord, e.g., Wei v. State of Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985); *Delicata v. Bowen*, 116 F.R.D. 564, 566 (S.D.N.Y. 1987). Second, Smolko's argument that GTE "concealed" the defect in her January 17, 1996 attempt at service is wholly unsupported by the record and false.[5] Smolko never cited any facts or law in support of this conclusory allegation. Moreover, Smolko could have discovered her failure to serve a valid summons by simply examining her amended complaint and the affidavit of service filed with the district court on January 25, 1996. Indeed, Smolko discovered her mistake and corrected it in April 1996, when she obtained a new summons and re-served GTE. (Record 13.)

Likewise, the district court correctly declined to exercise its discretion to grant Smolko a second extension of time to serve until April 23, 1996. A discretionary extension under Rule 4(m) was not required simply because the statute of limitations for Smolko's claim had expired. In the absence of good cause, "a district court may in its discretion still dismiss a case even after considering that the statute of limitations has run." *Panaras v. Liquid Carbonic Indus. Corp.*, 94 F.3d 338, 341 (7th Cir. 1996); *accord, e.g. Adams v. Allied Signal Aerospace Co.*, 74 F.3d 882, 887 (8th Cir. 1996); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298, 1306 (3rd Cir. 1995); *Estate of Zachery v. Questcare*, 895 F. Supp.

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[5] Moreover, "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

1472, 1474-76 (M.D. Ala. 1995) (dismissing case even though a subsequent filing would be barred by the statute of limitations because, as here, "the plaintiff's actions . . . resulted in and were the sole cause of the ultimate failure to effect timely service of process").

Thus, there is no basis for excusing Smolko's failure to effect proper, timely service. The district court, therefore, properly dismissed this action, and the Eleventh Circuit properly affirmed. This Court should not expend its limited resources by reviewing Smolko's frivolous attempt to obtain yet another opportunity to prosecute this action.

CONCLUSION

For the foregoing reasons, Respondent respectfully suggests this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

MICHAEL W. JOHNSTON
Counsel of Record
SCOTT G. BLEWS
KING & SPALDING
191 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondent

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